APPENDIX

Order Denying Rehearing En Banc

(Filed April 4, 1975)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COULMBIA CIRCUIT

September Term, 1974

Civil Action 1633-72
No. 73-2120

JOSLYN N. WILLIAMS, *Appellant*

v.

L. QUINCY MUMFORD, Librarian of Congress, et al.

Before: BAZELON, *Chief Judge;* WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges.*

Order

It appearing that appellants' suggestion for rehearing *en banc* and amicus curiae's suggestion for rehearing *en banc* having been transmitted to the full Court and there not being a majority of the Judges in regular active service in favor of having this case reheard *en banc,* it is

ORDERED by the Court *en banc* that the aforesaid suggestions for rehearing *en banc* are denied.

Per Curiam

For the Court:

/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

Statement of Circuit Judge Robinson, with whom Chief Judge Bazelon and Circuit Judges Wright and Leventhal join, as to why they would grant rehearing *en banc.*

SPOTTSWOOD W. ROBINSON, III, *Circuit Judge:*

It is hardly necessary in this age to argue the worth of the class action in our ever-expanding system of jurisprudence. Over the years it has promoted the convenience of courts and parties infinitely, reduced the expense of lawsuits incalculably, and contributed immeasurably to efficient judicial administration. It has, too, made its mark on the development of the law. The reports are dotted with landmark cases which without benefit of representative litigation would never have seen the light of day.

Even more profoundly, the class action has provided access to the judicial process for those who need it most. It has been the refuge of the poor, the hope of the downtrodden, and the salvation of the many whom our social institutions all too frequently victimize, unwittingly or otherwise. Truly it is said that "[t]he class action is one of the few legal remedies the small claimant has against those who command the status quo."[1]

In sum, as two leading authorities have aptly observed, "[i]t now is apparent that the increasing complexity and urbanization of modern American society has tremendously magnified the importance of the class action as a procedural device for resolving disputes affecting numerous people."[2] And since class-action litigation could be chilled by non-appealability of denials of certifications save in narrowly limited circumstances, it is highly important to ascertain whether the panel's decision to that effect is correct.[3] The importance of the question is underscored by the number of decisions it has generated in other cir-

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[1] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 186, 94 S.Ct. 2140, 2156, 50 L.Ed. 2d 732, 748 (1974) (Douglas, J. dissenting).

[2] 7 C. Wright & A. Miller, Federal Practice § 1751, at 510 (1972).

[3] Rehearing *en banc* is warranted "when the proceeding involves a question of exceptional importance." Fed.R.App.P. 35(a)(2).

cuits, and the difficulty of the problems by the conflict of opinion which plagues them.[4]

I would, accordingly, grant rehearing of this case *en banc*. That is not necessarily to say that the panel reached the wrong result. It is to say, however, that in my view the matter calls for consideration and decision by the full court.

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[4] *See* Yaffee v. Powers, 454 F.2d 1362, 1364-1365 (1st Cir. 1972); Caceres v. International Air Transport Ass'n, 422 F.2d 141, 142-144 (2d Cir. 1970); City of New York v. International Pipe and Ceramics Corp., 410 F.2d 295, 298-299 (2d Cir. 1969); Rodgers v. United States Steel Corp., 508 F.2d 152, 159-161 (3d Cir. 1975); Hackett v. General Host Corp., 455 F.2d 608, 621-626 (3d Cir.), cert. denied, 407 U.S. 925, 92 S.Ct. 2460, 332 L.Ed.2d 812 (1972); Brunson v. Board of Trustees, 311 F.2d 107, 108-1099 (4th Cir. 1962), cert. denied, 373 U.S. 933, 83 S.Ct. 1538, 10 L.Ed.2d 690 (1963); Lamarche v. Sunbeam Television Corp., 446 F.2d 880 (5th Cir. 1971); Siebert v. Great Northern Dev. Co., 494 F.2d 510, 511 (5th Cir. 1974); Walsh v. City of Detroit, 412 F.2d 226, 227 (6th Cir. 1969); King v. Kansas City Southern Indus., 479 F.2d 1259, 1260 (7th Cir. 1973); Thill Sec. Corp. v. New York Stock Exchange, 469 F.2d 14, 15-17 (7th Cir. 1972); Price v. Lucky Stores, 501 F.2d 1177, 1179 (9th Cir. 1974); Gerstle v. Continental Airlines, 466 F.2d 1374, 1377 (10th Cir. 1972).

(Caption omitted in printing)

Decision

Decided February 10, 1975

Michael D. Hausfeld with whom *Jerry S. Cohen* were on the brief for appellants.

Earl J. Silbert, United States Attorney, *John A. Terry, Derek I. Meir* and *Michael G. Scheininger,* Assistant United States Attorneys, were on the brief for appellees.

Roderic Boggs, was on the brief for the Washington Lawyers Committee for Civil Rights Under Law as *amicus curiae.*

Before: ROBB and WILKEY, *Circuit Judges,* and MARKEY,* *Chief Judge,* for the United States Court of Customs and Patent Appeals.

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge:* Williams and Bostick are black employees of the Library of Congress. Bostick claims that from the time he began his employment with the Library in 1947 he has been subject to racial discrimination as regards his job classification and promotion. On or about 19 April 1972 Bostick filed a formal complaint alleging discrimination with the Equal Employment Opportunity (EEO) Office of the Library of Congress. Four months later he amended his complaint and alleged discrimination affecting all other black employees of the Library. In November 1972 the EEO Office returned the amended complaint, stating that the office was not equipped to handle broad inquiries into the general policies and practices of the Library.

Williams had been employed as a copyright examiner with the Library since June 1967. Soon after he began his

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* Sitting by designation pursuant to 28 U.S.C. § 293(a).

employment with the Library he was elected president of Local 1826 of the American Federation of Government Employees, a union which represents Library employees, and president of a task force named "Black Employees of the Library of Congress." Williams alleges he was active in promoting equal employment in the Library and in aiding employees who brought discrimination actions. In June 1972 he was given notice of removal effective 21 July 1972.[1] The removal was based on charges of material misrepresentations relating to his schooling, made on his 1967 application for the position of copyright examiner. In lieu of removal, on 21 July 1972 the Library accepted a resignation submitted by Williams to be effective on 11 August 1972. However, shortly before the effective date of his resignation, Williams requested that his resignation be withdrawn. After the Library refused to allow the withdrawal, on 11 August Williams filed his administrative complaint with the EEO Office, alleging that his resignation was coerced and that his removal was racially motivated.

Three days later Williams also filed in the District Court an action solely on his own behalf, alleging that his removal was the result of racial discrimination and that his resignation had been coerced. On 20 March 1973 Williams filed an amended complaint, adding an allegation that 180 days had passed without final administrative action on his administrative complaint. At this point Bostick's allegations of discrimination were also added to Williams' complaint. Finally, allegations were added alleging discrimination against all blacks currently employed by the Library, all blacks who had been employed at any time since 1960, and all blacks who had sought employment unsuccessfully

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[1] Williams also contends he was given the notice of removal just one week before he was to address the American Library Association's convention about the racial employment policies and practices of the Library.

since 1960, thus making the complaint on its face a class action.

On 20 August 1973, after a hearing the District Court denied Williams' and Bostick's request for class certification. The denial was based on two grounds: First, that Williams' and Bostick's claims were not typical of the claims of the class they sought to represent as required by Rule 23(a)(3), Federal Rules of Civil Procedure. Second, given the effective administrative remedies available to federal employees apart from Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972,[2] the class action was not "superior to other available methods for fair and efficient adjudication of the controversy" as required by Rule 23(b)(3), Federal Rules of Civil Procedure.

On 25 September 1973 an appeal from the refusal to certify a class action was taken.[3] We are presented with the question whether the refusal by a district court to certify a class action constitutes an appealable order. On the facts of this case, we decide that such an order is not appealable and therefore dismiss this appeal for lack of jurisdiction.

I. Appealability Under 28 U.S.C. § 1291

The principal source of our jurisdiction to hear appeals from the District Court is 28 U.S.C. § 1291 which provides: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." Our task, thus, must be to determine whether the refusal to certify a class action constitutes a final decision. A final decision is not necessarily "the last order possible to be made in a case . . . ";[4] however, to be

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[2] 42 U.S.C. § 2000(e)-16.

[3] The District Court refused a request to certify the question for appeal under 28 U.S.C. § 1292(b) on 10 October 1973.

[4] *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152 (1964).

"final" it must have the effect of resolving litigation on the merits. We have been instructed by the Supreme Court to give a flexible interpretation to "final decision" when used in the context of section 1291. As a result, the requirements of finality must be given a "practical rather than a technical construction."[5] "The inquiry requires some evaluation of the competing considerations underlying all questions of finality—'the inconvenience and costs of piece-meal review on the one hand and the danger of denying justice by delay on the other.' *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950) (footnote omitted)."[6]

Applying this analysis, it becomes apparent that an order refusing to certify a class action is generally not a final decision within the meaning of section 1291.[7] It does not dispose of litigation. It is purely procedural in nature, in that it determines merely the parties to the action without expressing any judgment as to the merits of the case. Moreover, the correctness of the District Court's determination does not evade review since it, along with other procedural decisions, is brought up on appeal after final disposition on the merits.

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[5] *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

[6] *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974).

[7] *Caceres* v. *International Air Transport Assoc.*, 422 F.2d 141 (2nd Cir. 1970); *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F.2d 295 (2nd Cir. 1969); *Hackett* v. *General Host Corp.*, 455 F.2d 618 (3rd Cir.), *cert. denied*, 407 U.S. 925 (1972); *Lemarche* v. *Sunbeam Television Corp.*, 446 F.2d 880 (5th Cir. 1971); *Siebert* v. *Great Northern Dev. Co.*, 494 F.2d 510 (5th Cir. 1974); *Walsh* v. *City of Detroit*, 412 F.2d 226 (6th Cir. 1969) (order permitting class action); *King* v. *Kansas City So. Indus., Inc.*, 479 F.2d 1259 (7th Cir. 1973); *Thill Securities Corp.* v. *New York Stock Exchange*, 469 F.2d 14, 17 (7th Cir. 1972) (denial of a motion to strike class action allegations); *Gerstle* v. *Continental Airlines, Inc.*, 466 F.2d 1374 (10th Cir. 1972).

Having stated the general rule, two qualifications must be made and their relevance considered. First, it must be recognized that in some types of cases the refusal to certify a classification, as a practical matter, does dispose of the action. This is because the plaintiff has such a small monetary or other interest to be vindicated in the action that it would not be worth the plaintiff's time to continue the action. In a series of recent cases, the Second Circuit has developed a body of law relating to this type of case, commonly referred to as the "Death Knell" doctrine. Secondly, in some cases a subsidiary controversy develops as an offshoot of the main litigation. A decision disposing of such an offshoot may be held to be a final decision, even if the decision is procedural in nature, if it appears likely that the matter would evade review if taken on appeal after a final disposition of the entire litigation. This has been called the Collateral Order doctrine. We turn now to examine both doctrines in more detail.

A. *The Applicability of the "Death Knell" Doctrine*

The "Death Knell" doctrine was developed in the Second Circuit in the crucible of *Eisen* v. *Carlisle and Jacquelin.* In *Eisen I* [8] the Second Circuit denied a motion to dismiss an appeal from a District Court order refusing to certify a class action. In that case, Eisen sued on behalf of himself and all odd-lot purchasers and sellers on the New York Stock Exchange alleging antitrust and Securities Act violations. Eisen's claim for damages was only for $70.00. Appropriately enough, the court noted:

> We can safely assume that no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen. . . . If the appeal is dismissed, not only will Eisen's claim never be adjudicated, but no appellate court will be given the chance to

[8] 370 F.2d 119 (1969), *cert. denied,* 386 U.S. 1035 (1967).

> decide if this class action was proper under the newly amended rule 23 [Federal Rules of Civil Procedure].[9]

The Second Circuit faced the same issue soon thereafter in *Green* v. *Wolf Corp.* Plaintiff Green and the members of the class alleged that they had required to pay an excessive price for certain publicly held securities. As the court noted, "Green obviously does not intend to press what will probably be an enormously complex and expensive action to recover less than $1,000."[10] In two cases consolidated under the title *Korn* v. *Franchard Corp.*,[11] the court decided that Mrs. Korn's suit for violations of the federal securities laws and for violations of New York law "will go no further without class suit designation." Because Mrs. Korn's losses amounted to $386, the Second Circuit denied a motion to dismiss an appeal denying class action certification. However, in the companion case the actual claims of the representative plaintiffs were for about $8,500. The court concluded, "[t]hat figure is close enough to the federal jurisdictional minimum for certain types of cases to suggest it is sufficient incentive to keep the case alive."[12] Accordingly, the "Death Knell" doctrine was inappropriate in that case and the appeal was dismissed.

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[9] 370 F.2d at 120.

[10] 406 F.2d 291, 295 n.6 (1968), *cert. denied*, 395 U.S. 977 (1969).

[11] 443 F.2d 1301 (2nd Cir. 1971).

[12] 443 F.2d at 1306-07. More recently, the "Death Knell" doctrine has been specifically rejected by the Seventh Circuit, *King* v. *Kansas City So. Indus., Inc.*, 479 F.2d 1259 (7th Cir. 1973), and criticized by the Third Circuit, *Hackett* v. *General Host Corp.*, 455 F.2d 618 (3rd Cir.), *cert. denied*, 407 U.S. 925 (1972). However, the vitality of the doctrine has been reasserted by the Second Circuit. *General Motors Corp.*, v. *City of New York*, 501 F.2d 639 (1974); *Kohn* v. *Royall, Koegel & Wells*, 496 F.2d 1094; (1974); *Herbst* v. *International Tel. & Tel. Corp.*, 495 F.2d 1308 (1974); *Shayne* v. *Madison Square Garden Corp.*, 491 F.2d 397 (1974).

In this case, it is clear that both Bostick and Williams have a sufficient incentive to continue this suit. Williams in his original complaint requested reinstatement in his former position. Today Williams in addition would be entitled to approximately two and a half years' back pay should he prevail,[13] an amount which we can safely assume is greatly in excess of $10,000.00 As to Bostick, the request is for a higher GS rating, which he alleges was improperly denied him. In addition, it should be noted that the Equal Employment Opportunity Act amendments specifically provide for a reasonable attorney's fee for the prevailing party at the discretion of the court in just this type of case.[14] It certainly may be questioned whether the "Death Knell" doctrine can ever be applied to a case where attorney's fees are available to the prevailing party.[15]

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[13] 42 U.S.C. § 2000(e)-5(g), made applicable to the Federal Government by 42 U.S.C. § 2000e-16(d).

[14] 42 U.S.C. § 2000(e)-5(k), made applicable to the Federal Government by 42 U.S.C. § 2000e-16(d).

[15] *Hackett* v. *General Host Corp.*, 455 F.2d at 622-23:

> Thus the "death knell" rule would operate only in that narrow category of cases where the object of the suit is the recovery of money damages, and where a statute affords federal jurisdiction regardless of amount. This narrow category is, however, significant for consumer advocates. But even in the field, the "death knell" rationale, based upon the assumption that no competent lawyer would under take a complicated case to recover a small amount of money, must be qualified by several considerations. A number of federal statutes provide for the award of counsel fees and costs.[3] Indeed the statute under which Mrs. Hackett sues contains such a provision. 15 U.S.C. § 15 (1971). If the "death knell" is to ring for her case the rope is in her attorney's hand. There is no certain basis for the assumption that an interested holder of a small claim will be unable to prevail upon a private attorney to pursue that claim in the hope of being compensated by the award of "reasonable counsel fees" against a wrongdoer. Moreover the burgeon-

B. *The Applicability of the Collateral Order Doctrine*

The Collateral Order doctrine had its origins in the Supreme Court case of *Cohen* v. *Beneficial Industrial Loan Corp.*,[16] in which the Court considered the constitutionality of requiring a plaintiff in a New Jersey federal court to post bond to insure payment of defendant's attorney's fees as required by New Jersey statute. The case was "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[17] In *Cohen* the interlocutory order being appealed was effectively immune from review after judgment. If the District Court's decision not to apply the New Jersey statute were not reviewable at that point, the defendant would, as a practical mat-

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ing in recent years of interest in publicly supported legal service organizations and of private support for legal aid and public interest law firms cannot be disregarded.[4] Many small but important claims heretofore for purposes of litgation, beyond the pale of financial practicabilty, have been successfully litigated by such organizations in recent years. Thus an adverse class action decision may ring out as a death knell on far fewer occasions than superficial analysis would suggest.

[3] *E.g.* statutes providing for damages arising from the following improper actions, a single instance of which may harm individual members of large classes, additionally provide that successful plaintiffs' attorney shall be awarded reasonable attorneys' fees and costs: Failure to disclose under the Truth in Lending Act 15 U.S.C. § 1640 (1971); Unlawful wiretapping, 18 U.S.C. § 2520 (1971). Other statutes place the decision of whether to allow reasonable attorneys' fees and costs within the discretion of the district court: Securities Acts Violations; 15 U.S.C. §§ 77k, 77www; 78i (1971). *See also* attorneys' fees in suits involving torts committed by the Federal Government where its immunity has been waived.

[4] *See* Note, The New Public Interest Lawyers, 79 Yale L.J. 1068 (1970).

[16] 337 U.S. 541 (1949).

[17] 337 U.S. at 546.

ter, be denied any protection under the statute. *Eisen III* [18] is a more recent application of the same doctrine. The District Court decided that the defendants woud be required to bear 90% of the cost of notice to the plaintiff class of odd-lot buyers and sellers. Obviously, even if the defendants could have theoretically sought to collect their outlay had they prevailed, there would be little practical possibility of collecting over $20,000 from the over two million members of the class. As the Supreme Court noted on appeal from *Eisen III:*

> Analysis of the instant case reveals that the District Court's order imposing 90% of the notice cost on respondents likewise falls within "that small class [of decisions which finally determine claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated]." It conclusively rejected respondents' contention that they could not lawfully be required to bear the expense of notice to the members of the petitioners' proposed class. Moreover, it involved a collateral claim unrelated to the merits of the petitioners' claims. Like the order in *Cohen*, the District Court's judgment on the allocation of notice cost was "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it . . . ." [19]

In this case, the refusal to certify a class action did not determine collateral claims completely independent of the merits of the case. The order is indistinguishable from other procedural determinations made in the course of discovery and trial. No funds were required to be expended as in *Eisen*, nor rights granted under independent statutes to

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[18] *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2nd Cir. 1973), *affirmed on this issue*, 417 U.S. 156 (1974).

[19] 417 U.S. at 172.

be dispensed with as in *Cohen*. Above all, the correctness of the District Court's decision is subject to effective review on appeal from final judgment. We hold, in conclusion, that the District Court's refusal to certify a class action in this case did not constitute the "Death Knell" of the action nor was it a collateral and independent determination. Therefore, the decision was not a "final" one within the meaning of section 1291.

II. Appealability Under 28 U.S.C. § 1292(a)(1)

In the alternative, appellants contend that this court has jurisdiction over this appeal under 28 U.S.C. § 1292(a)(1) which provides:

> The courts of appeal shall have jurisdiction of appeals from: (1) Interlocutory orders of the district court . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court . . . .

It is argued that the net effect of the refusal to certify a class action is considerably to narrow the scope of any possible injunctive relief in the event plaintiffs ultimately prevail on the merits. Appellants cite in support of their position two cases from other Circuits: *Brunson* v. *Board of Trustees*[20] and *Yaffee* v. *Powers*.[21] Both cases are premised on the assumption that the refusal to certify a class action, since it would eventually affect the scope of equitable relief, itself constituted a modification of or a refusal to issue an injunction. We view this as an unwar-

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[20] 311 F.2d 107 (4th Cir. 1962) (per curiam), *cert. denied*, 373 U.S. 933 (1963).

[21] 454 F.2d 1362 (1st Cir. 1972). Since briefs were filed in this case, the Ninth Circuit has decided that the dismissal of a class action with leave to amend without class action allegations was appealable under section 1292(a)(1), *Price* v. *Lucky Stores, Inc.*, 501 F.2d 1177 (1974).

ranted expansion of the statutory language. By analogy to the reasoning of these courts, most procedural motions in an action requesting equitable relief would be appealable by *either* party. In this view we are supported by the Second Circuit. In its opinion in *City of New York* v. *International Pipe and Ceramics Corp.*[22] it rejected the argument that a refusal to certify a class action is appealable under section 1292(a)(1). The court noted, as do we, that the denial of class action treatment constitutes neither issuance nor denial of an injunction.[23]

Although this precise question has never been presented to the Supreme Court, the Court has had to consider the scope of the injunction exception to the final judgment rule. In *Switzerland Cheese Association, Inc.* v. *E. Horne's Market, Inc.*,[24] the Court held that the denial of a plaintiff's motion for summary judgment seeking injunctive relief was not a denial or refusal of an injunction within the meaning of section 1292(a)(1). This was because

> . . . the denial of a motion for a summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim. It is strictly a pretrial order that decides only one thing—that the case should go to trial. Orders that in no way touch on the merits of the claim but only relate to pretrial procedures are not in our view "interlocutory" within the meaning of section 1292(a)(1).[25]

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[22] 410 F.2d 295 (2nd Cir. 1969).

[23] The Court also stated that "[t]he cases ctied by the City dealing with injunctive relief sought by school children to prevent discrimination on the ground of race have no application here." 410 F.2d at 295. The opinion offers us no further elaboration.

[24] 385 U.S. 23 (1966).

[25] 385 U.S. at 25.

Although it is difficult to reconcile all of the case law interpreting section 1292(a)(1),[26] it would appear that the Supreme Court in *Switzerland Cheese* has opted for a narrow construction of the statutory language. Although an order denying class action certification *might at some later stage* have an effect on the scope of equitable relief, such orders "in no way touch on the merits of the claim" and thus fall outside of the scope of the section.

Conscious as we are of our responsibility to maintain the jurisdictional balance drawn by the Congress under sections 1291 and 1292, we are particularly reticent to expand upon statutory language which was intended as a limited exception to the final judgment rule.[27] We emphasize that

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[26] *See, e.g., Enelow* v. *New York Life Insurance Co.*, 293 U.S. 379 (1935); *Ettleson* v. *Metropolitan Life Insurance Co.*, 317 U.S. 188 (1942); *City of Morgantown* v. *Royal Insurance Co.*, 337 U.S. 254 (1949); *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176 (1955). In *Enelow* and *Ettleson* it was held that where the plaintiff's action was one originally cognizable in law, a procedural motion deciding that defendant's equitable defenses should be tried first was held to be an appealable order under section 1292(a)(1)'s predecessor. On the other hand, in *City of Morgantown* and *Baltimore Contractors* it was held that when the plaintiff's action was one cognizable in equity and the defendant's counterclaim was either one in law *(City of Morgantown) or one in equity (Baltimore Contractors)*, the trial court's decision as to the order of the proceedings was interlocutory in form and substance and was not appealable under section 1292(a)(1). Of course, the importance of these decisions, as a practical matter, has been undercut by *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959), and its progeny. However, these cases do give some indication of the meaningless distinctions which continue to be given some currency in this area of the law.

[27] In *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176 (1955), the Supreme Court discussed in some detail the legislative history of section 1292. Specifically, the Court discussed the fundamental policy determinations underlying the statute:

> The Congress is in a position to weigh the competing interests of the dockets of the trial and appellate courts, to consider the

the District Court did not state that the claim for an injunction had no merit, nor that it lacked jurisdiction to grant an injunction, nor even did it express any opinion as to whether injunctive relief was warranted at any particular point in the proceedings. The District Court denied certification of a class action under Rule 23, Federal Rules of Civil Procedure, a quite distinguishable action. As a result, appellants have failed to bring the order within the only arguably relevant exception to the final judgment rule, 28 U.S.C. § 1292(a)(1).

The appeal must therefore be *Dismissed.*

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practicability of savings in time and expense, and to give proper weight to the effect on litigants. When countervailing considerations arise, interested parties and organizations become active in efforts to modify the appellate jurisdiction. This Court, however, is not authorized to approve or declare judicial modification. It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal systems. . . . Any such *ad hoc* decisions disorganize practice by encouraging attempts to secure or oppose appeals with the consequent waste of time and money. The choices fall in the legislative domain. They are enlargement of the allowable list of appealable interlocutory orders; abandonment of fragmentary appeals; or general allowance of such appeals in the discretion of the trial judge upon findings of need, with or without the consent or approval of the appellate court.

348 U.S. at 181-82 (footnote omitted).

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1633-72

JOSLYN N. WILLIAMS and ROBERT L. BOSTICK, Individually and in behalf of all others similarly situated, *Plaintiffs*

v.

L. QUINCY MUMFORD, Individually and as Librarian of the Library of Congres, et al., *Defendants*

Memorandum and Order

(August 17, 1973)

This is a suit for declaratory, injunctive, and monetary relief against allegedly racially discriminatory practices at the Library of Congress. The defendants are L. Quincy Mumford, the Librarian of Congress, and Robert W. Hutchison, the Library's Director of Personnel. Jurisdiction is based on title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C.A. § 2000e-16, which specifically brings federal employees, including those at the Library of Congress, within the coverage of the Act. Presently pending before the Court are the plaintiffs' motion and application for class action determination and the defendants' motions to strike the class action allegations, to sever the claims of the two individual plaintiffs, to dismiss as to defendant Hutchison, and for a protective order. The motion to certify as a class action will be denied, the claims of the two plaintiffs will be severed, the protective order will be granted,[1] and the defendant Hutchison will be dismissed.

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[1] At the time of the oral hearing on the motions, it was agreed by counsel that the question of the scope of discovery against which the protective order is sought would be governed by the ruling on the motion for class action certification.

In their amended complaint,[2] the plaintiffs bring this suit as a class action under Fed. R. Civ. P. 23(a), 23(b)(2) and (3) on behalf of all black persons currently employed at the Library, all those black persons who were employed by the Library at any time since 1960 but who are no longer employed, for whatever reason, and all black persons who unsuccessfully sought employment with the Library at any time since 1960. Racially discriminatory practices relating to recruitment, hiring, promotion, segregated job classifications, and firing are alleged to have been conducted by the defendants. Although it has been held that a suit brought by a black alleging title VII violations is perforce a sort of class action for other employees similarly situated, *Jenkins* v. *United Gas Corp.*, 400 F.2d 28, 33 (5th Cir. 1968), the requirements of Fed. R. Civ. P. 23 relating to class actions must still be fulfilled before that remedy may properly be invoked. *Arey* v. *Providence Hospital*, 55 F.R.D. 62, 67-68 (D.D.C. 1972). In this case the plaintiffs have failed to meet the requirement of Fed. R. Civ. P. 23(a)(3) that their claims be typical of the claims of the class, as well as the requirement of Fed. R. Civ. P. 23(b)(3) that the class action method of adjudication be superior to other available methods for the "fair and efficient" resolution of the controversy. In this connection, several concerns uniquely related to title VII suits against federal government agencies dictate that this case not be maintained as a class action.

The claims of the individual plaintiffs demonstrate their unique nature, and thus preclude the plaintiffs from meet-

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[2] This case was originally brought to enjoin the alleged unlawful firing of the plaintiff Williams under circumstances outlined, *infra*. After denial of the plaintiff Williams' motion for summary judgment, leave was granted to file an amended complaint under title VII, 180 days having elapsed since the filing with the Library of the initial complaint of discrimination and final action not having been taken. The instant class action complaint, joining the plaintiff Bostick and adding the defendant Hutchison, was then filed.

ing the typicalness requirement of Fed. P. Civ. P. 23(a)(3). In June, 1972, over five years after the plaintiff Williams had been hired as a copyright examiner, he was informed that his employment would be terminated in July because of false statements in his employment application.[3] Williams alleges that in an attempt to gain time for negotiation he was coerced into sigining a resignation effective August 11, 1972. On that date, Williams unsuccessfully attempted to withdraw that resignation. Still later on the 11th, Williams filed a complaint with the Equal Opportunity Office of the Library, alleging that his firing was for racially discriminatory reasons. Shortly thereafter, the original complaint in this case was filed.[4]

In the amended complaint, the plaintiff Bostick alleges that since he began his employment at the Library in 1947 on three occasions he has requested a job reclassification for purposes of promotion. In the first two attempts, the reclassifications became effective approximately six and four years later, respectively. The third request for promotion has been pending for over two years. Bostick alleges that white employees are promoted without their request, and that whites hired at the same time as he have attained far higher grade levels because of racial discrimination. Bostick is a "visual information specialists" in the Congressional Research Service of the Library. The position is unique. No one else holds such a position in the Library.

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[3] Although the truth of the statements in the application was at issue in the earlier stages of his litigation, counsel for the plaintiffs admitted at the oral hearing on the motions that the statements were in fact false. Transcript 13-14. Williams contends, however, that in order to obtain a job he had to demonstrate qualifications superior to those of white applicants. Thus, he alleges that the false statements in the application were the result of racial prejudice that would have denied him the job if he had not lied.

[4] *See* note 2, *supra*.

From the foregoing, it is apparent that the claims of the named plaintiffs in this case lack the typicalness of the claims of the class that is needed to make them proper class representatives. Whether Williams resigned or was fired, he has admitted to making false statements on his original application for employment; Bostick is employed in a unique capacity, one given to classification dispute, as is evident from the allegations of the complaint. Even though both of the plaintiffs are black and the charge of the complaint is racial discrimination, the cases of the plaintiffs are too far removed from the general policy and patterns of discrimination alleged in the complaint. Each of their claims of discrimination is unique, and thus the Court holds that neither is a proper class representative. *See Smith* v. *North American Rockwell Corp.*, 50 F.R.D. 515 (N.D. Okla. 1970).

In reaching this conclusion, the Court is fully cognizant of the rule that in determining whether a case should proceed as a class action the question to be answered is not whether the plaintiffs will prevail on the merits, but rather whether the requirements of Fed. R. Civ. P. 23 have been met. *Halverson* v. *Convenient Food Mart, Inc.*, 458 F.2d 927 (7th Cir. 1972); *Miller* v. *Mackey International, Inc.*, 452 F.2d 424 (5th Cir. 1971). Thus in describing the allegations of the individual plaintiffs, no view is rendered on the possible success of their claims on the merits.

The Court imposes no requirement that the plaintiffs show that they were discriminated against individually before they may maintain a class action. *Hadnott* v. *Laird*, 149 U.S. App. D.C. 358, 365 n. 21, 463 F.2d 304, 311 n. 21 (1972). But the Court is equally mindful that proof of racial motivation alleged by the plaintiffs to have occurred in their situations does not thereby prove the claims of those whom they seek to represent. Relief against the discriminatory practices alleged in the complaint hinges upon proof that each practice is prohibited conduct that has been en-

gaged in by the Library. In view of the potentially severe res judicata consequences of class suits, the Court must be careful to ascertain that the requisite typicalness of the plaintiffs' claims is present. Therefore, the Court does require that the plaintiffs be members of the class they purport to represent with claims typical of that class so as to guarantee effective representation of the class members. Because the other members of the potential class clearly are not similarly situated to the plaintiffs, whose claims of discrimination involve unique circumstances, the plaintiffs are not proper class representatives and the motion to certify the class will be denied. *See Huff* v. *N.D. Cass Co.*, 468 F.2d 172 (5th Cir. 1972) (reheard en banc Oct. 30, 1972, decision pending); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1218-19 (1971).

Even if the plaintiffs were proper class representatives, however, the requirement of Fed. R. Civ. P. 23(b)(3) that a class action be "superior to other available methods for the fair and efficient adjudication of the controversy" has not been met. *See, e.g., Wilcox* v. *Commerce Bank of Kansas City*, 474 F.2d 336, 345 (10th Cir. 1973). This requirement is particularly significant in title VII suits against the federal government authorized by the 1972 amendments, *supra*.

Although the 1972 amendments for the first time made title VII specifically applicable to the federal government, it has been well established that the federal government has no license to discriminate. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). The 1972 amendments to title VII have removed the final barrier to suit, the defense of sovereign immunity, and federal employers are now fully subject to its strictures. But federal employees have long had and still have advantages over their privately employed counterparts in remedying alleged illegal conduct by their employers. Title VII is frequently the only basis upon which a victim of

private discrimination may proceed. On the other hand, federal employees have long been able through judicial action to require agencies to follow their own personnel procedures and regulations. *Service* v. *Dulles,* 354 U.S. 363 (1957). Thus, unlike the situation of the employee in the private sector, effective administrative remedies against racial discrimination are available to federal employees outside of title VII, and the need for class action adjudication is less apparent than in instances in which title VII alone is in the picture. The circumstances of this case are particularly illustrative.

The Library of Congress has had regulations for processing complaints of discrimination since at least 1967. Library of Congress Regulation [LCR] 2010-3. That regulation requires the Librarian to take corrective action upon a finding of discrimination at the final administrative step. *Ringer* v. *Mumford,* 335 F. Supp. 749 (D.D.C. 1973). Given this effective administrative remedy outside of title VII, the Court finds that a class action is not the superior method of adjudication in this case, and thus the motion to certify the class under Fed. R. Civ. P. 23(b)(3) must be denied on that basis.

There is yet a third independent ground upon which the motion to certify the class must be denied. Although the case is brought as a class action alleging across the board racially discriminatory practices throughout the Library, neither plaintiff raised any allegation of class discrimination in his administrative complaint of discrimination before the Library.[5] Thus the allegations of class discrimination have not proceeded through the proper exhaustion of administrative remedies, and cannot form the basis for a class action at this time. *Hackley* v. *Johnson,* — F. Supp. —, — n. 11 (D.D.C. July 13, 1973) (Gesell, Jr.) (dictum).

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[5] LCR 2010-3, § 3 E and LCR 2010-3 (Appendix, § V.C make it clear that a group complaint could have been filed by either plaintiff.

Title VII suits against federal employers are normally to be reviews of administrative action. *Id.*, — F. Supp. at —. As such, the complaint should be limited to the allegations made at the administrative level.

In *Hackley*, unlike the present case, the Court had before it the final and complete administrative record. Judge Gesell concluded in that case that it was proper that the suit proceed solely as a review of that record. In the present case, no final administrative decision was made on the complaint of either plaintiff within 180 days of the filing of the complaint, and therefore the plaintiffs had a right to file suit in this Court. 42 U.S.C.A. § 2000e-16(c). Of necessity, the instant suit cannot be decided solely on the basis of a review of the administrative record because a complete record does not exist. But given the policies of title VII suits against the federal government, even the de novo proceedings in this Court should be restricted to the matters raised in the administrative complaint. The motion to certify as a class action must therefore be denied.

A contrary result is not required by the many decisions under Title VII concerning private employers who have read the initial complaint to the Equal Employment Opportunity Commission [EEOC] broadly in finding sufficient exhaustion to form the basis for a class action. First, the unique status of federal employees even without title VII mandates that complete exhaustion be required. Second, even under the broad principle that an action brought pursuant to title VII should be limited "to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination," *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970), the plaintiffs have not sufficiently exhausted their administrative remedy to bring this case as a class action.

The allegations of the complaint, it will be recalled, are: (1) that the plaintiff Bostick was denied promotion in a unique job; and (2) that the plaintiff Williams was fired

because of his race, and not because of his admittedly false statements on his employment application. It cannot be expected that an investigation of these charges would reasonably be expected to encompass the across the board allegations of discrimination which the plaintiffs have made in their complaint, covering the entire recruitment, hiring, promotion, and termination practice in the entire Library of Congress. In all likelihood, their allegations would not lead to such a broad investigation even within the two departments in which the plaintiffs were employed.[6] At the same time, it must be recalled that either plaintiff could have filed his initial charge with the Library as a group complaint, note 5 *supra*. Neither did. In these circumstances the scope of the instant suit cannot be expanded beyond the allegations of discrimination against the plaintiffs merely by adding class action language in the complaint.

What has gone before indicates that the claims of the individual plaintiffs, unique in their nature, must be severed as improperly joined under Fed. R. Civ. P. 20. The broad ranging discovery sought by the plaintiffs relating to the Library's entire employment file since 1960 will be restricted to matters relating to the plaintiffs' individual claims.

The motion of the defendant Hutchison to dismiss will be granted. Under the 1972 amendments, the "head of the department, agency, or unit, as appropriate, shall be the defendant." 42 U.S.C.A. § 2000e-16(c). Thus the defendant Hutchison, the director of personnel, is not a proper defendant and should be dismissed. Moreover, it is clear

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[6] In this respect, the attempted reliance by the plaintiffs on the findings of racial discrimination in the Library by the hearing examiner in *Ringer* v. *Mumford*, 355 F.Supp. 749 (D.D.C. 1973) is misplaced. The Court did not hold that those findings were not arbitrary and capricious. It had no occasion to review those findings of class-based discrimination and still has none. 355 F. Supp. at 753, 754 n. 11.

that any relief that the Court may subsequently order on the individual claims of the plaintiffs can be afforded by orders against the remaining defendant, the Librarian of Congress.

Therefore, it is this 17th day of August, 1973.

ORDERED

1. That the motion of the plaintiffs for certification as a class action be and the same is hereby denied;

2. That the motion of the defendants to sever the claims of the individual plaintiffs be and the same is hereby granted;

3. That the motion of the defendants for a protective order be and the same is hereby granted and the requests for discovery served upon the defendants shall be limited to matters relating to the administrative complaints of discrimination filed with the Library by the plaintiff Williams on August 11, 1972, and by the plaintiff Bostick on April 19, 1972; and

4. That the motion to dismiss of the defendant Hutchison be and the same is hereby granted.

WILLIAM P. JONES
Judge

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